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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

FABIAN ROMAN,

Defendant and Appellant.

F075534

(Super. Ct. No. 14CR-01131)

OPINION

THE COURT[*]

APPEAL from a judgment of the Superior Court of Merced County. Harry L. Jacobs, Judge. (Retired judge of the Merced County Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.)

Kendall Dawson Wasley, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Michael P. Farrell, Assistant Attorney General, Julie A. Hokans, Clara M. Levers and Carlos A. Martinez, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Detjen, Acting P.J., Smith, J. and Snauffer, J.

Defendant Fabian Roman was convicted by plea of second degree murder in adult criminal court for a crime he committed when he was 16 years old. On appeal, he contends that under Proposition 57, his case should be remanded to juvenile court for a transfer hearing. The People agree. Following our request for supplemental briefing, defendant also contends his case should be remanded to give the trial court the opportunity to exercise its discretion under Senate Bill No. 620 (2017-2018 Reg. Sess.) (Senate Bill 620) to consider striking his firearm use enhancement. The People object, arguing the issue is not cognizable because defendant failed to obtain a certificate of probable cause. We conclude a certificate of probable cause was not necessary. Accordingly, we conditionally reverse the judgment and remand for further proceedings.

BACKGROUND

On December 7, 2014, Raymond Sevilla was shot and killed in a park in Los Banos as he ran from a group of people that included 16-year-old defendant, who was one of the shooters. Defendant was charged with murder in adult criminal court.

On October 7, 2015, defendant pled no contest to second degree murder (Pen. Code, § 187, subd. (a))[1] and admitted personally using a firearm (§ 12022.5, subd. (a)), in exchange for a term of 15 years to life, plus 10 consecutive years for the firearm enhancement, and dismissal of an attempted murder charge (§§ 664, 187, subd. (a)), a street terrorism charge (§ 186.22, subd. (a)), and gang enhancement allegations (§ 186.22, subd. (b)(1)(C)).

On April 6, 2016, the trial court sentenced defendant to 15 years to life with the possibility of parole, plus 10 consecutive years for the firearm enhancement.

On November 9, 2016, Proposition 57 took effect.

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1 All statutory references are to the Penal Code unless otherwise noted.

On April 24, 2017, more than one year after sentencing, defendant filed a notice of appeal, arguing defense counsel had abandoned his case and failed to file a notice of appeal. Defendant did not obtain a certificate of probable cause.

On November 30, 2017, this court deemed defendant's notice to be timely filed based on the attorney general's "agreement that [defendant] made a sufficient showing for relief from default …."

On January 1, 2018, while defendant's appeal was pending, Senate Bill 620 took effect.

DISCUSSION

I. Proposition 57

" 'Historically, a child could be tried in [adult] criminal court only after a judicial determination, before jeopardy attached, that he or she was unfit to be dealt with under juvenile court law.… The general rule used to be that "any individual less than 18 years of age who violates the criminal law comes within the jurisdiction of the juvenile court, which may adjudge such an individual a ward of the court.' " (*People v. Superior Court* (*Lara*) (2018) 4 Cal.5th 299, 305 (*Lara*).) Then, beginning in 1999, changes were made to this historical rule and "prosecutors were permitted, and sometimes required, to file charges against a juvenile directly in criminal court, where the juvenile would be treated as an adult." (*Ibid.*)

On November 8, 2016, voters enacted Proposition 57, and it went into effect the next day. Proposition 57 "largely returned California to the historical rule. 'Among other provisions, Proposition 57 amended the Welfare and Institutions Code so as to eliminate direct filing by prosecutors. Certain categories of minors … can still be tried in criminal court, but only after a juvenile court judge conducts a transfer hearing to consider various factors such as the minor's maturity, degree of criminal sophistication, prior delinquent history, and whether the minor can be rehabilitated. (Welf. & Inst. Code, § 707, subd. (a)(1).)' " (*Lara, supra*, 4 Cal.5th at pp. 305-306.) In *Lara*, the

Supreme Court concluded the transfer provisions of Proposition 57 apply retroactively to all juveniles charged directly in adult court whose judgments were not final at the time Proposition 57 was enacted. (*Lara*, at pp. 308-309.)

Here, the parties agree, as do we, that defendant's judgment should be conditionally reversed and his case remanded to juvenile court for a transfer hearing in accordance with Proposition 57 and *Lara*, *supra*, 4 Cal.5th 299.

II. Senate Bill 620

By way of supplemental briefing, defendant contends remand is also necessary to give the trial court an opportunity to exercise its discretion, newly granted by Senate Bill 620, to strike defendant's firearm enhancement. The People counter that this issue is not cognizable on appeal because defendant entered into a plea agreement with an agreed-upon sentence and then failed to obtain a certificate of probable cause. The People maintain defendant must pursue his claim by filing a petition for writ of habeas corpus in the sentencing court.

Senate Bill 620, effective January 1, 2018, permits a trial court, in its discretion, to strike firearm enhancements imposed under sections 12022.5 and 12022.53. (§§ 12022.5, subd. (c) & 12022.53, subd. (h); Stats. 2017, ch. 682, §§ 1, 2.) The statutes provide that "[t]he court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law." (§§ 12022.5, subd. (c) & 12022.53, subd. (h).) The amended statutes apply retroactively to defendants whose sentences were not final at the time Senate Bill 620 came into effect. (*People v. Woods* (2018) 19 Cal.App.5th 1080, 1089-1091; see *People v. Hurlic* (2018) 25 Cal.App.5th 50, 56 (*Hurlic*) [courts have unanimously concluded that Senate Bill 620's grant of discretion applies retroactively to all nonfinal convictions]; *People v. Billingsley* (2018) 22 Cal.App.5th 1076, 1080; *People v. McDaniels* (2018) 22 Cal.App.5th 420, 424.) "[A] remand is required unless the

record shows that the trial court clearly indicated when it originally sentenced the defendant that it would not in any event have stricken a firearm enhancement." (*People v. McDaniels*, at p. 425; *People v. Billingsley*, at p. 1081 [remand is required when "the record does not 'clearly indicate' the court would not have exercised discretion to strike the firearm allegations had the court known it had that discretion"].)

As a general rule, a criminal defendant who enters a guilty or no contest plea with an agreed-upon sentence may not challenge that sentence on appeal unless he first obtains a certificate of probable cause from the trial court. (§ 1237.5, subd. (a); *People v. Panizzon* (1996) 13 Cal.4th 68, 76.) Recently, however, based on the foundation of *Harris v. Superior Court* (2016) 1 Cal.5th 984 (*Harris*), courts have held that a certificate of probable cause was not required in cases raising Proposition 57 and Senate Bill 620 issues, even though the defendants had entered into agreed-term plea agreements. (*Hurlic*, *supra*, 25 Cal.App.5th at p. 53 [Senate Bill 620]; *People v. Baldivia* (2018) 28 Cal.App.5th 1071, 1078 (*Baldivia*) [Proposition 57].)[2]

In *Harris*, the defendant had entered into an agreed-term plea agreement. (*Harris*, 1 Cal.5th at p. 987.) Citing *Doe v. Harris* (2013) 57 Cal.4th 64, 66 (*Doe*), the Supreme Court noted " 'the general rule in California is that the plea agreement will be " 'deemed to incorporate and contemplate not only the existing law but the reserve power of the state to amend the law or enact additional laws for the public good and in pursuance of public policy.…' " [Citation.] That the parties enter into a plea agreement thus does not have the effect of insulating them from changes in the law that the Legislature has intended to apply to them.' " (*Harris*, at p. 990.) *Harris* then concluded the electorate intended Proposition 47 to apply to the parties of a plea agreement (*Harris*, at p. 991),

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[2] The People contend *Hurlic* was wrongly decided. *Baldivia* was filed after supplemental briefing was complete.

and "the People are not entitled to set aside the plea agreement when a defendant seeks to have his sentence recalled under Proposition 47" (*id.* at p. 993).

In *Hurlic*, the court concluded the defendant did not require a certificate of probable cause, despite having entered into an agreed-term plea agreement, to raise a claim that Senate Bill 620 should apply to him. (*Hurlic*, *supra*, 25 Cal.App.5th at pp. 54, 59.) The court explained that a certificate of probable cause is not required "when the defendant's challenge to the agreed-upon sentence is based on our Legislature's enactment of a statute that retroactively grants a trial court the discretion to waive a sentencing enhancement that was mandatory at the time it was incorporated into the agreed-upon sentence." (*Id.* at p. 53.) Citing *Doe* and *Harris*, *Hurlic* noted that "courts will not amend a plea agreement to add ' "an implied promise [that] the defendant will be unaffected by a change in the statutory consequences attending his or her conviction." ' [Citation.] Because defendant's plea agreement does not contain a term incorporating only the law in existence at the time of execution, defendant's plea agreement will be 'deemed to incorporate' the subsequent enactment of Senate Bill No. 620 … and thus give defendant the benefit of its provisions without calling into question the validity of the plea. What is more, because Senate Bill No. 620 grants the trial court at most the discretion to strike the … firearm enhancement and leaves the [current felony] sentence intact, the trial court may [decline to strike the enhancement and] end up reimposing the originally agreed-upon … prison sentence …." (*Hurlic*, *supra*, 25 Cal.App.5th at p. 57, fn. omitted.) If, on the other hand, the court does strike the enhancement, the plea agreement still survives and the prosecution may not seek to set aside the plea. (*Ibid.*)

Then, in *Baldivia*, where the defendant also had entered into an agreed-term plea agreement, the appellate court relied on *Doe*, *Harris*, and *Hurlic* to conclude the defendant did not require a certificate of probable cause to raise the issue of whether Proposition 57 applied to him "because these changes in the law were implicitly incorporated into his plea agreement." (*Baldivia*, *supra*, 28 Cal.App.5th at p. 1074.) In

other words, "[the] plea agreement incorporated the possibility that changes in the law would alter the consequences of his plea." (*Id.* at p. 1078.) "Consequently, his contentions [did] not challenge the validity of his plea." (*Id.* at p. 1074.) "If the electorate or the Legislature expressly or implicitly contemplated that a change in the law related to the consequences of criminal offenses would apply retroactively to all nonfinal cases, those changes logically must apply to preexisting plea agreements, since most criminal cases are resolved by plea agreements. It follows that defendant's appellate contentions were not an attack on the validity of his plea and did not require a certificate of probable cause." (*Id.* at p. 1079.)

We agree with the reasoning of these cases. And we see nothing in the record to suggest that the plea agreement contained a term requiring the parties to apply only the law in existence at the time the agreement was made. Thus, we deem the agreement to incorporate the subsequent enactment of Senate Bill 620, giving defendant the benefit of its provisions without calling into question the validity of the plea. We conclude defendant does not require a certificate of probable cause.

II. Futility of Remand

The People also argue that even if we decide a certificate of probable cause was not required here and we address the issue on its merits, remand is not necessary because the record shows that the trial court—by approving the agreed-term plea agreement and sentencing defendant to the agreed-upon sentence—clearly indicated that it would not in any event have stricken a firearm enhancement. Defendant argues the record does not make an adequate showing. We agree with defendant.

"Generally, when the record shows that the trial court proceeded with sentencing on the erroneous assumption it lacked discretion, remand is necessary so that the trial court may have the opportunity to exercise its sentencing discretion at a new sentencing hearing. [Citations.] Defendants are entitled to 'sentencing decisions made in the exercise of the "informed discretion" of the sentencing court,' and a court that is unaware

of its discretionary authority cannot exercise its informed discretion." (*People v. Brown* (2007) 147 Cal.App.4th 1213, 1228; *People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391.) But there is an exception to this principle: a matter need not be remanded to allow the trial court to exercise its discretion when doing so would be an " 'idle act' " because " 'the record shows that the trial court would not have exercised its discretion even if it believed it could do so ….' " (*People v. Gamble* (2008) 164 Cal.App.4th 891, 901.)

Here, at the plea hearing, the trial court did not make any statements suggesting its opinion of the case. The court accepted defendant's plea and instructed the probation officer to prepare a report.

In the report, the probation officer stated her evaluation:

> "The defendant committed one of the most heinous crimes that a human being can commit by shooting the victim in cold blood, which ended in his death. Further, the defendant committed the crime on behalf of his, 'gang', which is evident by the information gathered by the investigating officers. Due to the serious nature of the offense committed, the defendant is ineligible for formal probation. As such, this officer believes that the defendant should be committed to the California Department of Corrections and Rehabilitation for the maximum time as prescribed by law. Time credits applicable to this matter are attached for the court's review and consideration."

At the sentencing hearing, the prosecutor informed the trial court (a different judge than the judge who presided at the plea hearing) the agreed-upon term in this case was "a result of consideration of [the appropriate factors,] given that [defendant] is a juvenile offender. [¶] … [¶] And those were taken into consideration in granting the offer. I want to make the record clear on that." After hearing statements from the victim's family, the court stated, "[T]his was a stipulated sentence. The Court, therefore, will deny probation because, number one, it was a stipulated and agreed upon sentence; and number two, this case is certainly not appropriate for granting of probation." The court then imposed the agreed-upon sentence, later noting only that this was a "[v]ery sad case."

We do not believe it is clear from the plea court's acceptance of the plea with the agreed-upon sentence, or from the sentencing court's "[v]ery sad case" comment and imposition of the agreed-upon sentence, that the court would not have stricken the firearm enhancement had it known it had that discretion, although that very well may have been the case. Under these circumstances, we will remand for the trial court to exercise its discretion to consider whether to strike the enhancement. We offer no opinion as to how the court's discretion should be exercised.

DISPOSITION

The conviction and sentence are conditionally reversed, and the matter is remanded to the juvenile court with directions to conduct a juvenile transfer hearing. When conducting this hearing, the juvenile court shall, to the extent possible, treat the matter as though the prosecutor had originally filed a petition in juvenile court and then moved to transfer defendant's case to adult criminal court under the applicable laws as amended by Proposition 57.

If, after conducting the juvenile transfer hearing, the juvenile court finds it would not have transferred defendant to adult criminal court, it shall treat defendant's conviction as a juvenile adjudication and impose an appropriate disposition within its discretion.

If, after conducting the juvenile transfer hearing, the court determines it would have transferred defendant to adult criminal court because he is not a fit and proper subject to be dealt with in juvenile court, then defendant's conviction is reinstated and the trial court shall exercise its discretion to consider whether to strike the firearm use enhancement (Pen. Code, § 12022.5, subd. (a)) and resentence defendant. If the court strikes the enhancement, it shall resentence defendant. If it declines to strike the enhancement, it shall reinstate the judgment. The court is directed to prepare an amended abstract of judgment and forward certified copies to the appropriate authorities.